SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 515

JOSEPH MANDOLI, ALSO KNOWN AS GUISEPPE MENDOLIA,
Petitioner,

vs.

DEAN ACHESON, SECRETARY OF STATE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION IN SUPPORT

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Of Counsel.

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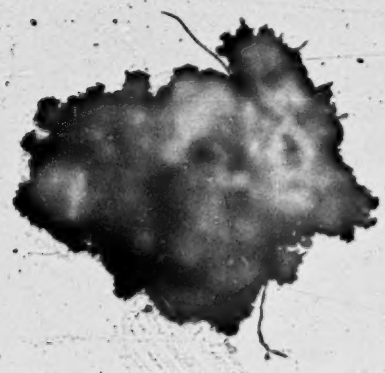
Citations:



(15) I was born on the 17th day of September in the year 1907 Since birth I have resided as follows: (street) 0.
Italy from 1912 to date
(State where, when, and for what periods)

pursuing the following occupations: Mason

My permanent residence is Via Ten.B.Granozzi,45, S.Ninfa (Trapani), Italy (State where and when with respect to each occupation) and has been so since 1912
I have entered the United States as follows: Resided from birth to 1912
(Place, date, name of port of entry, name used in entering, and name of vessel or aircraft, if any, by which brought)

(16) The names and addresses of my parents are as follows: Mother Marianna Spina Address S.Ninfa, Italy
Father Francesco Mendolia Address do.
and my nearest relative in the United States is Beatrice Adorno - sister-in-law residing at 100 Columbia Ave., Newark, N.J.

(17) My personal description is: I am 40 years of age, of the male sex and white race; my height is 5 feet and 12 inches; my complexion fair, color of hair brown-grey color of eyes brown, and I bear the following marks of identification: none

(18) I submit herewith photographs of myself in accordance with the regulations.
WHEREFORE I apply for a certificate of identity under section 503 of the Nationality Act of 1940.

Giuseppe Mendolia
(Signature of applicant)

Subscribed and sworn to before me this 19th day of August, 1948

Leonard E. Thompson
Vice Consul of the United States of America.

AFFIDAVIT OF WITNESS

I, the undersigned, solemnly swear that I am a citizen of Italy; that I reside at the address written below my signature hereto affixed; that I know the applicant who executed the application hereinbefore set forth to be the person he represents himself to be, and that the statements made in his application are true to the best of my information and belief; further, that I have known the applicant personally for 6 years.

Giuseppe Bronzo
(Signature of witness)
Via Mulinello, 34, Ficarazzi (Palermo), Italy
(Address of witness)

Subscribed and sworn to before me this 19th day of August, 1948

Leonard E. Thompson
Vice Consul of the United States of America.

(If certificate of identity is denied, the diplomatic or consular officer shall state here fully the reason for the denial.)

Service No. 9865

LET/gp

No fee prescribed and none collected.

(The sheet of fingerprints is to be attached to the left inside margin of this form.)

16—88513-1

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION IN SUPPORT

The Petitioner, by his attorney, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit (R. 34) which affirmed a judgment of the District Court denying petitioner's claim for a declaratory judgment of citizenship (R. 24).

Opinions Below

The Court of Appeals opinion is unreported and is set forth at page 31 of the record herein. The District Court filed no opinion.

Jurisdiction

The Judgment of the Court of Appeals was entered on January 10, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. There is no statute providing for the expatriation of native-born citizens by reason of prolonged residence abroad. For the past forty years, the Departament of State and the Department of Justice have held that persons born in the United States, of dual nationality at birth, are free to reside abroad as long as they desire. In the absence of any statute, and in the light of this administrative practice, is a person born in the United States, and invested with Italian nationality as well as American citizenship at birth required to return to the United States within a reasonable time after attaining his majority in 1928 and is he expatriated by failing to return to the United States where he sought to do so in 1937, 1944 and 1947 but was refused passports by the American consul in Italy?

2. Where a native born American citizen was required to serve in the Italian army during the days of Mussolini, was inducted into such army in 1931, and subscribed to an oath of allegiance to the King of Italy in connection with such military service, did such conduct result in expatriation or was it vitiated by duress?

Statute Involved

Section 2 of the Expatriation Act of March 2, 1907 (34 Stat. 1228; 8 U.S.C. 17) provides:

> "That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state."

Statement

Petitioner was born in Ohio on September 17, 1907. At the age of four months, his Italian parents took him to Italy where he resided until 1948 when he returned to the United States to prosecute this action (R. 22-23).

Under Italian law, as found by the District Court, petitioner was considered an Italian at birth, and as such he was subject to its military laws. The District Court likewise found that the petitioner was inducted into the Italian Army and served therein from April 14, 1931 until September 5, 1931 (R. 23). The Department of State refused to recognize the petitioner's claim to American citizenship in 1937, 1944, and in 1947 because he took an oath of allegiance to the King of Italy in connection with Italian military service which was forced upon him during the era of Mussolini (R. 6, 10, 28). This action was instituted for a declaratory judgment of citizenship to upset that ruling.

The only issue raised by the complaint and answer was whether the petitioner was expatriated upon the ground noted above (R. 41-43). Originally, the District Court found that the petitioner expatriated himself by reason of "joining the Italian Army by taking an oath of allegiance to the Italian Government which he was not coerced to take" (R. 18). The District Court, however, over objections, signed findings that expatriation resulted not only by taking an oath of allegiance to the King of Italy but also by reason of the failure of the petitioner to return to the United States after attaining his majority (R. 23).

After the appeal was filed in the Circuit Court, the Attorney General advised the Secretary of State that he was not warranted in expatriating American citizens who were inducted into the Italian Army and required to take an oath of allegiance in connection with such military service (41 *Op. Atty. Gen.* No. 16). A copy of this opinion was filed with the Court of Appeals. On January 10, 1952, the Court of Ap-

peals affirmed the decision of the District Court. It held that the statutory grounds of expatriation were not exclusive and that petitioner was obliged to return to the United States upon majority in order to retain his birthright. It ruled that it was unnecessary to "consider whether an oath of allegiance to the King of Italy, which appellant was obliged to take when he was drafted into the Italian Army, was in itself enough to expatriate him" (R. 33).

Reasons for Granting Certiorari

1. The decision below is the first appellate judicial ruling since the enactment of our expatriation statutes in 1907, that there may be non-statutory grounds of expatriation. If the judiciary may, apart from Congressional enactment, expatriate our citizenry, upon an *ad hoc* basis, usurpation of legislative functions as well as chaos will follow. The dangers which the decision below portend, and the importance of its ruling in the field of citizenship and expatriation can not be minimized, and for this reason certiorari is sought.

2. The decision below is in conflict with decisions of the Court of Appeals for the Ninth Circuit which hold that the statutory grounds of expatriation are exclusive. *Leong Kwai Yin* v. *United States*, 31 F. 2d 738 (1907 Expatriation Act); *Kawakita* v. *United States*, 190 F. 2d 506, cert. granted February 4, 1952 (1940 Nationality Act). It was the lack of a legislative expression which led to the enactment of the Act of March 2, 1907 (34 Stat. 1228; 8 U.S.C. 17), the statute here involved. The history of the Act clearly demonstrates, as it did with regard to denaturalization (*Bindczyck* v. *Finucane*, 342 U.S. 83) that "Congress formulated a self-contained, exclusive procedure". *Tsiang, The Question of Expatriation in America Prior to 1907* (1942) pp. 103-109; *House Document 326*, 59th Congress, 2d Sess., p. 23, *et seq.*

3. The Court below misconstrued and misapplied *Perkins* v. *Elg*, 307 U.S. 325. Its complete failure to understand or appreciate the background of that case led to its statement that no reason existed "why one who, like appellant is born Italian as well as American should have less need to elect American citizenship when he becomes of age than one who is born American and *acquires* citizenship during minority." In *Perkins* v. *Elg*, foreign citizenship was acquired during minority by *naturalization*. Naturalization in a foreign state has been a statutory ground of expatriation since 1907. For many years, the Attorney General held that foreign naturalization by a native born American resulted in expatriation during minority (36 Op. Atty. Gen. 535). *Perkins* v. *Elg* held to the contrary, and permitted the native born American to cast off the expatriating effect of foreign naturalization during minority by returning to the United States and thus electing American citizenship upon attaining majority. There is here involved no foreign naturalization which can have any expatriating consequences. And, the agencies charged with the administration of our citizenship laws, the State and Justice Departments, have uniformly held ever since the 1907 statute, that a dual national at birth may remain abroad indefinitely and need not make an election upon attaining majority. *Tomasicchio* v. *Acheson*, 98 F. Supp. 166; III *Hackworth, Digest of International Law*, 370-371; *Matter of R.*, Volume I, I. & N. Dec. 389; *Monthly Review, December 1943, Immigration & Naturalization Service*, p. 6. If this long standing administrative practice, which is entitled to great weight (*Billings* v. *Truesdell*, 321 U.S. 542) is to be overturned with all the serious consequences of confusion and injustice which will thereby result, it should only come to pass after a ruling of the Supreme Court.

4. If the decision below is to stand, then the Department of Justice will be compelled to reexamine its policy of prose-

cuting for treason dual nationals at birth who remained abroad after majority. *Kawakita* v. *United States, supra.* The government is in the inconsistent position of denying expatriation in the *Kawakita* case now pending in this Court (No. 570) while affirming it upon similar facts in the instant case. The importance of the decision below to the proper prosecution of treason cases and its inconsistency with the *Kawakita* case in which certiorari was granted on February 4, 1952, warrant review by this Court.

5. The effect of the decision below is to discriminate between native born citizens upon the basis of ancestry. It forbids the native-born citizen of Italian parents from residing abroad at his majority. A native born citizen of American parents is not so restricted. Distinctions "between citizens solely because of their ancestry are by their very nature odious to a free people" *Hirabashyi* v. *United States,* 320 U.S. 81, 100. In the instant case there is no compelling wartime necessity for this discrimination and before final sanction be given to a doctrine which would create a second class citizenship among our native born, Supreme Court review should be granted.

6. As noted by the Court of Appeals and admitted by the Government in the court below, petitioner was required by Italian military law not only to serve in the Italian army but also to take an oath of allegiance in connection with such military service. Whether such conduct resulted in expatriation was the single issue raised by the State Department and the pleadings herein. That petitioner was not expatriated by taking an oath of allegiance in 1931 under legal compulsion should be obvious if expatriation is to continue as an expression of free choice. After the institution of suit herein, the Attorney General ruled in 41 Op. Atty. Gen. No. 16 (May 8, 1951) as follows:

> "In my opinion, the choice of taking the oath or violating the law was, for a soldier in the army of Fascist

Italy, no choice at all. Mr. Panzica's oath can only be regarded as having been taken under legal compulsion amounting to duress. See *Dos Reis ex rel. Camerd* v. *Nichols*, 161 F. 2d 860 (C.A. 1st); *Podea* v. *Acheson*, 179 F. 2d 306 (C.A. 2d)."

It would therefore seem that the defendant will no longer wish to press the claim of expatriation upon the ground originally advanced in this dispute.

Conclusion

It is submitted that the court below erred in ruling that the petitioner was expatriated. The denial of his claim to American citizenship under the admitted facts herein, presents an issue of importance in the administration of our nationality laws which merits review by this Court.

Respectfully submitted,

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